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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~1046~~ 46

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES A. WHITE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals on rehearing *en banc* (A. 128–153) is reported at 405 F. 2d 838. The opinion of a panel of the court of appeals (A. 119–127) is not reported.

JURISDICTION

The judgment of the court of appeals on rehearing *en banc* was entered on January 7, 1969. The petition for a writ of certiorari was filed on February 6, 1969, and was granted on April 7, 1969 (394 U.S. 957). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the ruling in *Katz* v. *United States,* 389 U.S. 347, respondent's Fourth Amendment rights were violated where federal agents overheard conversations between respondent and an informant by means of an electronic device carried by the informant, with the informant's consent, but without obtaining a warrant.

2. Whether, even if otherwise applicable to overhearings accomplished with the consent of one of the parties to the conversation, *Katz* v. *United States* should be applied to such an overhearing which occurred prior to the date *Katz* was decided.

STATEMENT

One of two indictments returned in the United States District Court for the Northern District of Illinois charged that respondent transferred heroin without an order form on December 9, 1965, in violation of 26 U.S.C. 4705(a), and that on the same date he received heroin knowing that it had been illegally imported, in violation of 21 U.S.C. 174 (A. 17–18). A second indictment charged that on December 16, 1965, and December 29, 1965, respondent transferred heroin without an order form and that on those two dates and on January 8, 1966, he received heroin knowing that it had been illegally imported (A. 14–16). The two indictments were consolidated for trial, and a jury found respondent guilty on all counts. On November 30, 1966, he was

sentenced as a second offender[1] to twenty-five years' imprisonment on each of seven counts, the sentences to run concurrently. He was also fined $5,000 on each count, for a total fine of $35,000.

The issues in this case arise from the admission of testimony by federal agents concerning conversations they overheard incident to a series of narcotics transactions between respondent and an informant, Harvey Jackson, by means of a radio transmitter concealed on the informant. Before each meeting with respondent, the informant first met with the agents, who searched him for narcotics and outfitted him with the transmitter (see *e.g.* A. 20–21). On four occasions, the informant went to his own home with the agents to await the arrival of respondent; one agent concealed himself in a kitchen closet with the informant's consent and heard and saw the meetings between the informant and the respondent, while a second agent overheard their conversations over a radio receiver. Two other conversations occurred in the informant's automobile. A single conversation in the respondent's home and a conversation in a restaurant were also overheard by means of the radio equipment.

A. THE TRANSACTIONS OVERHEARD

1. *The initial transaction (December 9, 1965) and the overhearings of two conversations in the informant's home.* On Thursday, December 9, 1965, at about 8:00 p.m., narcotics agent Carl Jackson, who had hidden in a closet in the kitchen of informant Harvey

[1] In 1955, respondent had been sentenced in the Northern District of Illinois to a term of 4 years for selling narcotics.

Jackson's home, saw respondent give the informant a package containing heroin and heard respondent say that the package contained "[o]ne good ounce" and that he would return the following day for payment (A. 21–25, 40). A second agent, Robert DeFauw, who was situated in an automobile parked near the informant's home, made notes of the conversation which he heard on a radio that received the transmissions from the device on the informant's person (A. 41, 43–44, 84).

At about 10:45 a.m., the next morning, after the informant had telephoned respondent and told him to come to pick up the money (A. 25–27), respondent arrived at the informant's home and, in the kitchen, was given $1,000 by the informant. Respondent said he would have more "stuff" on Saturday night, December 11. Agent Carl Jackson saw and heard the meeting from the kitchen closet (A. 28–29), and agent DeFauw, stationed outside the home, heard the conversation over the radio (A. 45–48).

2. *The second transaction (December 16, 1965) and the overhearing of a conversation in respondent's home on December 14, 1965.* On Saturday, December 11, 1965, the informant Jackson went to a designated intersection to meet respondent, but the latter drove away shortly before Jackson could meet him (A. 30–31, 48–49). Later that day, in a telephone conversation which the informant allowed an agent to hear, respondent said that he had not waited because he did not like "to linger around when I got something on me." He also said that he would have more "stuff" on December 14 (A. 31–33).

On Tuesday, December 14, at 7:00 p.m., after the agents gave him $360, the informant went to respondent's residence. Agent DeFauw, who listened to their conversation over his radio in a nearby automobile, heard them count the money and heard respondent say that he would meet the informant on Thursday, December 16, in front of a clothing store and would sell him two ounces for $1250. Respondent also told Jackson to move the "stuff" faster and that the "Dagoes" wanted payment more promptly. A subsequent search of the informant confirmed that he no longer had the $360 (A. 50–53).

That Thursday, at about 6:00 p.m., Harvey Jackson kept his appointment with respondent at the clothing store, and the two men drove away in the informant's automobile. Agent DeFauw, who followed in another vehicle, heard their conversation about the price and quality of heroin over the radio receiver. After respondent said that he had to meet "my man right on time because he won't wait," the informant left his automobile. DeFauw saw respondent pick up co-indictee Sam Minerva and drive him a short distance in the informant's car (A. 53–55). After the informant reentered his own automobile, narcotics agent Kerstann who also had been following respondent heard, on the radio receiver, respondent tell the informant that he had met his contact and would leave the package on the seat of the car. When respondent left, Kerstann entered the informant's car and took possession of a package which contained heroin (A. 73–74).

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3. *The third transaction (December 29, 1965) and the uncompleted fourth transaction.* On Tuesday, December 28, 1965, respondent again visited the informant's home. Narcotics agent Jackson, who was hidden in the closet, saw the informant give the respondent $1250 and heard the respondent tell him that he would have to get his money faster because the "Dago wants his money" (A. 34–36, 56). Over his radio receiver, agent DeFauw heard respondent tell the informant that he would have more heroin for him the next day (A. 57–58). The next day, the agents followed respondent and saw him meet with one Williams (A. 85–86). Later they observed co-indictee Sam Minerva enter respondent's car with a white shoe box and thereafter leave the vehicle carrying a leather brief case. Subsequently respondent entered a tavern where he spoke to the informant, and then each departed separately (A. 59–61). A short time later, respondent walked to the informant's car and handed him a sack (A. 81–83). Over a radio receiver, narcotics agent Meyer heard respondent ask the informant to drive Williams to the city's south side (A. 86–88). After discharging Williams, the informant gave agent DeFauw the paper sack which contained heroin (A. 89, 61).

On January 5, 1966, the respondent came to the informant's home. From the closet, agent Jackson observed the informant give respondent $1,300 and heard respondent tell the informant to bring an additional $950 to a restaurant (A. 36–39). Agent De-

Fauw also heard this conversation (A. 64–65). On January 7, 1966, the informant gave respondent the $950 at the restaurant. That meeting was observed by an agent in the restaurant, and agent DeFauw, in his automobile parked nearby, heard, over his radio receiver, respondent tell the informant that the price of heroin was going up to $2,500 for a package of "three things" and that he was to meet him at a particular intersection the next day where delivery would be made (A. 66–68, 89–90). The next day, January 8, the agents arrested respondent and Sam Minerva on the street shortly after they observed Minerva hand respondent a brown leather brief case which contained 1119.6 grams of heroin (A. 69–72, 83–84).

B. THE TRIAL

At the outset of trial, the government introduced evidence to show that it had attempted unsuccessfully to locate the informant, Harvey Jackson (A. 20, 39–40, 76–81). Respondent did not request a continuance on the ground that the informant was a material witness. Initially, after narcotics agent Carl Jackson stated that the informant had allowed him to listen, from the kitchen closet, to his conversation with respondent, respondent's counsel objected on the ground that he had "no way of telling what the conversation was" since Harvey Jackson could not be located (A. 23–24). Counsel then objected to testimony concerning a subsequent telephone conversation which the informant allowed the agent to hear, on the ground that the monitoring was a

"violation of the law both of Illinois and federal law, and the Federal Constitution" (A. 26). When testimony about the first conversation transmitted from the informant's home was introduced, respondent objected on the ground that it was overheard on a radio receiver "and the objection was made before, your Honor, that the radio communication was in violation of the statute" (A. 46). At the close of the government's case, respondent moved to strike the testimony concerning the conversations overheard on the radio receiver on the ground that they violated the Illinois Eavesdropping statute and the Fourth and Fifth Amendments to the Federal Constitution (A. 91).[2]

The informant's wife, whom respondent called as a witness, testified that she had seen her husband the previous evening (A. 103). Mrs. Jackson thereafter testified on cross-examination, however, that she did not know where to locate the informant (A. 116–117), and respondent did not move for a continuance.

C. THE DECISION OF THE COURT OF APPEALS

A panel of the court of appeals, one judge dissenting, reversed the conviction on the ground that, under *Katz* v. *United States*, 389 U.S. 347, the use of the transmitting device hidden on informer Jackson constituted an unreasonable search and seizure in the absence of a warrant (A. 119–127). On the government's petition for rehearing *en banc*, the full court, three

[2] In his motion for a new trial, respondent claimed that the court erred in admitting evidence of conversations obtained with the concealed radio transmitter and that he was denied a fair trial by the absence of Henry Jackson.

judges dissenting, also concluded that, both under *Katz* and under its understanding of the Fourth Amendment, respondent's rights were infringed when narcotics agents heard his conversations with the informant by means of the electronic device (A. 128–153). The court concluded that it was immaterial whether one party to a conversation consented to the use of the device, stating that the "crucial fact in each case is that the respective speakers did not consent to the overhearing of their statements and that the conversation was overheard by third persons uninvited by the speaker" (A. 136). The court distinguished *Lopez* v. *United States,* 373 U.S. 427, by interpreting it to apply only where the informant testifies at the trial about the conversation and the recording of such conversation is introduced for the limited purpose of corroboration (A. 142).

SUMMARY OF ARGUMENT

I

Respondent's Fourth Amendment rights were not violated by the concealment of a radio transmitting device on an undercover informant when he met with respondent to purchase narcotics from him. This Court has consistently held that the government may lawfully use the reports and testimony of undercover agents and informants concerning statements which criminal suspects have made to them, because the Fourth Amendment does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it" (*Hoffa* v. *United States,* 385 U.S. 293, 302). As the Court held

in *Lopez* v. *United States,* 373 U.S. 427, it follows from the rule that the informant is entitled to disclose the contents of a conversation that Fourth Amendment rights similarly are unaffected where a government agent carries a concealed recording device during his meetings with a suspect.

The court below departed from those principles in holding in this case that the use of the transmitting device without obtaining a warrant was unlawful, under the test announced in *Katz* v. *United States,* 389 U.S. 347, because respondent "justifiably expected" his conversations with the informant to be private. Unlike *Katz,* however, the government overheard the conversations in the present case with the consent of one of the parties thereto. Whatever may have been respondent's misplaced confidence in the informant, he had no constitutionally protected right to prevent the informant from disclosing his statements, either by relating them from memory at some later time or by consenting to have the conversations disclosed at the time they took place. Moreover, there are important interests which justify the use of transmitting devices, including the creation of a verifiable record of the conversation—to protect the suspect from overreaching and to save the informant from intimidation and impeachment—and the maintenance of contact with the informant during a time when he may be subject to recriminations if his undercover role is suspected.

Contrary to the decision below, this Court's decision in *Lopez* is not distinguishable on the ground that the agent testified in that case while the informant here did not. In ruling upon respondent's Fourth Amendment objection, the admissibility of the evidence obtained by means of the radio transmitter depends upon the legality of the use of the transmitter, and not upon subsequent circumstances existing at trial. The government having established that it had unsuccessfully attempted to locate Harvey Jackson, the informant, there was no reason to preclude it from introducing other accurate evidence of respondent's narcotics transactions.

II

The ruling of the court of appeals was premised on that court's interpretation of the new standards announced in *Katz* v. *United States, supra.* In *Desist* v. *United States,* 394 U.S. 244, however, this Court held that the standards in *Katz* were to be applied only to electronic surveillances occurring after the announcement of that decision. The overhearings in this case, which antedated *Katz* by several years, were unquestionably legal under prior law; indeed, most of the conversations took place in the informant's home. Here, as in *Desist,* the agents justifiably relied on earlier decisions, and retroactive application of the *Katz* rule would have an adverse effect on the administration of justice. There is no reason in the circumstances of this case to depart from the ruling in *Desist.*

ARGUMENT

I

THE AGENTS' TESTIMONY AS TO STATEMENTS MADE BY RESPONDENT TO AN INFORMANT DURING NARCOTICS TRANSACTIONS—WHICH THE AGENTS OVERHEARD BY MEANS OF A TRANSMITTER CONCEALED ON THE INFORMANT WITH HIS CONSENT—WAS PROPERLY ADMITTED IN EVIDENCE SINCE THE OVERHEARING DID NOT VIOLATE RESPONDENT'S FOURTH AMENDMENT RIGHTS

The principal issue in this case involves the effect of the Court's decision in *Katz* v. *United States,* 389 U.S. 347, on earlier decisions sustaining, against Fourth Amendment challenges, the admission of evidence secured through the use of undercover agents and informants, including evidence of conversations overheard or recorded by means of electronic devices concealed on informants. *E.g., Lopez* v. *United States,* 373 U.S. 427; *Hoffa* v. *United States,* 385 U.S. 293; *Lewis* v. *United States,* 385 U.S. 206.

The overhearings in the present case were accomplished by means of a transmitting device which a government informant consented to wear during his meetings with respondent. The informant carried the transmitter only at meetings which were held for the specific purpose of making arrangements for or completing a purchase of narcotics from respondent.[3] With only two exceptions the meetings took place in

[3] Although respondent, testifying in his own defense, denied that some of the meetings occurred (*e.g.* Tr. 571), he testified that he and the informant were engaged in gambling in 1965 and that this was the subject matter of their conversations whenever they did meet (Tr. 542–544).

the informant's home or automobile.[4] And the meetings which occurred in the informant's home were also observed and heard by another agent who was concealed in a closet.

Despite the clear distinction between the facts here and those in *Katz*—where agents employed a listening device to record the petitioner's voice without consent of either party to the conversation—the court below held, on the authority of *Katz*, that the informant's instantaneous disclosure, by means of an electronic device, of a conversation which he could later orally report is subject to the same constitutional restrictions as the government's electronic interception of a conversation which neither party thereto expects or desires to disclose. That decision, we submit, is neither required nor justified by the policies announced in *Katz*.

A. THE DECISION IN *Katz* v. *United States* DOES NOT IMPOSE FOURTH AMENDMENT RESTRICTIONS ON THE GOVERNMENT'S USE OF ELECTRONIC DEVICES TO MONITOR CONVERSATIONS WITH THE CONSENT OF ONE OF THE PARTIES THERETO

1. Our argument rests on the principle that the Fourth Amendment does not restrict the government's receipt and use of an informant's report concerning

[4] The two exceptions were a meeting, part of the second transaction, which took place in respondent's home, and another meeting, part of the fourth transaction, held in a restaurant. Another meeting, part of the third transaction, occurred at the restaurant, but there was no testimony concerning the conversation which occurred at this meeting. The fourth transaction alone did not result in a transfer of heroin to the informant; it was terminated prior to consummation when the respondent was arrested with heroin on his person before he was able to make any delivery to the informant.

statements which a suspect makes to him or in his presence. As the Court said in *Hoffa* v. *United States*, 385 U.S. 293, 302, "[n]either this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." In *Hoffa*, a local union official who had agreed to serve as an informant for the government secured frequent access to the petitioner's hotel suite and was privy to the petitioner's conversations, which he reported to federal agents and subsequently related at trial. The Court rejected the contentions that the informant had improperly insinuated himself into the hotel suite and that his reports and testimony were the product of an illegal "search" for verbal evidence; it held that "no interest legitimately protected by the Fourth Amendment is involved" (*ibid.*). Similarly, in *Lewis* v. *United States*, 385 U.S. 206, decided the same day as *Hoffa*, the Court rejected a Fourth Amendment challenge to the testimony of an undercover agent whom the petitioner had invited to his home for the purpose of executing an unlawful sale of narcotics. The Court held that the agent was lawfully on the premises and that he did not "see, hear, or take anything that was not contemplated, and in fact intended, by petitioner * * *" (385 U.S. at 210).

The Court in *Hoffa* expressly relied on the "unanimous" decision in *Lopez* v. *United States*, 373 U.S. 427, sustaining the admissibility of a revenue agent's testimony with respect to bribery offers by Lopez

during a conversation in the latter's office (see 385 U.S. at 302–303). In *Lopez* the Court, after noting that the agent was lawfully in Lopez' office with his consent, said: "The only evidence obtained consisted of statements made by Lopez to Davis [the agent], statements which Lopez knew full well could be used against him by Davis if he wished" (373 U.S. at 438). Thus, the Court held that the petitioner's statements were not "constitutionally protected communication[s]," that there was no Fourth Amendment violation in the circumstances whereby the agent participated in the conversation, and that the agent's testimony concerning these conversations was properly received (*ibid.*).

The Court's holding on that issue was the premise for the more significant ruling by the majority in *Lopez* that the concealment of an electronic recording device on the agent likewise did not violate Lopez' Fourth Amendment rights. The Court's reasoning is equally applicable to the present case (373 U.S. at 439):

> * * * [T]his case involves no "eavesdropping" whatever in any proper sense of that term. The Government did not use an electronic device to listen in on conversations it could not otherwise have heard. Instead, the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose. * * *

Under the rationale of *Lopez*, therefore, the electronic transmission of respondent's conversations with

the informant in this case involved no violation of respondent's Fourth Amendment rights. Here, as in *Lopez,* the transmitting device "neither saw nor heard more than the agent himself" (373 U.S. at 439). Although the defendant in *Lopez* knew that he was dealing with a government employee, while respondent here was unaware of the informant's role, the same principle governs both cases. Once it is recognized that the government may use an undercover agent or informant who may disclose the contents of a conversation he has overheard—as *Hoffa* and *Lewis* have held that it may—*Lopez* establishes that the communication is not constitutionally protected from simultaneous disclosure through the use of an electronic device that the agent or informant carries.

2. This court's decision in *Katz* v. *United States, supra,* does not undermine the rationale of *Lopez.*

There is no indication in *Katz* that the Court intended to disturb the premise of *Lopez* that the government's use of informants who themselves may reveal the contents of conversations does not violate the Fourth Amendment. Indeed, the Court in *Katz* cited *Lewis* for the proposition that "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection" (389 U.S. at 351). The "public" in *Lewis,* of course, was the undercover agent whom the petitioner had invited to his home for the purpose of completing a sale of narcotics.

Moreover, the test which the Court adopted in *Katz*—focusing on the individual's reasonable ex-

pectation of privacy—is fully consistent with the Court's resolution in *Hoffa* that the petitioner's "misplaced confidence" that an informant would not reveal his wrongdoing was not an "interest legitimately protected by the Fourth Amendment" (385 U.S. at 302). There is nothing in the rationale of *Katz* which undermines the Court's recognition in *Lewis* of the undesirability of imposing Fourth Amendment restrictions on the government's use of undercover agents and informants (see 385 U.S. at 210).

This much the court below did not dispute. The court held, however, that *Katz* requires a distinction between the use of informants who themselves may disclose the contents of conversations and the use of informants who carry concealed devices to record conversations or to transmit them simultaneously to the police. The court concluded that *Hoffa* and *Lewis* were unimpaired by *Katz* because the defendants in those cases "took the risk" that they might be dealing with informants and thus "waived" any Fourth Amendment rights with respect to the conversations (A. 141–142). But the court held that the concealment of the transmitting device on the informant in the present case was unlawful because respondent "justifiably expected his conversations to be private" (A. 140).

Phrases like "taking the risk" and "justifiable expectation of privacy," however, merely reflect the judicial conclusion that under the circumstances of the particular case the protection of the Fourth Amendment should or should not be extended to the particu-

lar conversations. Those "risks" and "expectations" are present in almost every criminal activity. It is not unrealistic to say that respondent in the present case, like the defendants in *Lewis* and *Lopez*, "took the risk" that he was dealing with an undercover informant and that the informant might be carrying a transmitting device. It is equally true that they "expected their conversations to be private" and relied on that expectation in engaging in unlawful conduct. But whether respondent's expectation was "justified", under the test announced in *Katz*, does not turn upon the extent of his confidence in Harvey Jackson or the measures he might have taken to avoid police surveillance. The critical inquiry, rather, is whether the policies of the Fourth Amendment protect respondent's expectation that Jackson would not be carrying a concealed transmitter supplied by federal agents. We submit that they do not.

Once it is recognized that respondent could not have maintained a Fourth Amendment challenge to the testimony of the informant in the present case, the issues raised by the use of the transmitting device emerge in proper focus. The respondent having freely engaged in the narcotic sales to the informant, the only interests of which he was deprived by the transmitting device were those which directly violate the integrity of the criminal process—the possibility that the informant's memory might fail or that he might be subject to impeachment on collateral matters and the opportunity to avoid the informant's testimony altogether by bribery, intimidation, or physical violence.

In *Lopez,* the Court specifically rejected the suggestion that those interests were constitutionally protected (373 U.S. at 439):

> Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory. We think the risk that petitioner took in the offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording.

The principle that there is no Fourth Amendment violation where a conversation which may be disclosed at trial is accurately recorded, either mechanically or by allowing another to hear it simultaneously, was premised in *Lopez* on *Rathbun* v. *United States,* 355 U.S. 107. There, the police listened to the defendant's conversation, without his knowledge, on an extension telephone with the consent of the other party. Although the case arose in the context of a claimed violation of Section 605 of the Communications Act, the Court's rationale would apply as well to a claim of a violation of the Fourth Amendment (355 U.S. at 111):

> * * * Each party to a telephone conversations takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes

> place there has been no violation of any privacy of which the parties may complain. * * *

The decision in *Katz* did not change the fact that each party to a conversation can have only limited control over the use which the other party makes of his statements. Just as one joint user of tangible property assumes the risk that the other user will expose it, and each has authority to consent to a search of the property (see *Frazier* v. *Cupp*, No. 643, 1968 Term, decided April 22, 1969), a participant in a conversation is necessarily subject to the risk that the other party may make it public. The timing of such disclosure—whether the other party elects to disclose the contents of the conversation at the time it occurs or thereafter—does not determine whether there has been a Fourth Amendment violation.[5] As Justice White stated in his concurring opinion in *Katz* (389 U.S. 347, 363, n. *):

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[5] Except for the court below, all the courts of appeals which have had occasion to rule on the issue since the *Katz* decision have so held. *United States* v. *Kaufer*, 406 F. 2d 550 (C.A. 2), affirmed, 394 U.S. 458; *United States* v. *Leighton*, 386 F. 2d 822 (C.A. 2), certiorari denied, 390 U.S. 1025; *United States* v. *Jackson*, 390 F. 2d 317 (C.A. 2), certiorari denied, 392 U.S. 935; *Koran* v. *United States*, 408 F. 2d 1321 (C.A. 5); *Dancy* v. *United States*, 390 F. 2d 370 (C.A. 5); *Handsford* v. *United States*, 390 F. 2d 373 (C.A. 5), certiorari denied, 391 U.S. 915; *Long* v. *United States*, 387 F. 2d 377 (C.A. 5), certiorari denied, 390 U.S. 952; *Fountain* v. *United States*, 384 F. 2d 624 (C.A. 5), certiorari denied *sub nom. Marshall* v. *United States*, 390 U.S. 1005; *Holt* v. *United States*, 404 F. 2d 914, 919–920 (C.A. 10). (Although a different panel of the Court of Appeals for the Tenth Circuit had ruled in accordance with the opinion below in *Doty* v. *United States*, Nos. 9031–9038, decided June 4, 1968, a petition for rehearing has been granted in that case.) See also *State of Washington* v. *Wright*, 444 P. 2d 676, certiorari denied, 394 U.S. 961; *Marshall* v. *United States*, 409 F. 2d 925 (C.A. 9).

> * * * When one man speaks to another he takes all the * * * risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. *Hoffa* v. *United States, supra.* It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another. * * *

Congress has also recently expressed its judgment that the monitoring of conversations by listening devices carried by one party thereto does not invade any constitutionally protected right. In Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (82 Stat. 211)—which was enacted after the narcotics transactions in this case and which prohibits the interception of communications without prior judicial authorization—Congress specifically provided that it shall not be unlawful to intercept a communication where a party to the communication has given prior consent to the interception (18 U.S.C. (Supp. IV) 2511).[6] Implicit in the Congressional judgment in the Omnibus Crime Act is a recognition that where one of the parties to a conversation consents to its overhearing, there is no invasion of privacy interests protected by the Fourth Amendment. Unlike non-consensual eavesdropping,

[6] A study committee of the American Bar Association has taken a similar view. See ABA, *Standards Relating to Electronic Surveillance*, Tentative Draft, p. 124. The Senate Report recognized that the distinction between consensual and non-consensual overhearing largely reflected existing law. S. Rep. No. 1097, 90th Cong., 2d Sess., p. 94. See *Lopez* v. *United States*, 373 U.S. 427; *Rathbun* v. *United States*, 355 U.S. 107.

which can be initiated solely at the discretion of the police and which can be used to overhear all conversations in the vicinity of the device, consensual monitoring is usually limited to a discrete transaction and can reach only those conversations to which the informant is privy. There is also little likelihood that an individual will discuss confidential personal matters with an informant who is simply attempting to make an illicit purchase of narcotics.

Moreover, unlike non-consensual eavesdropping, the use of electronic surveillance with the consent of one party to a conversation serves important interests other than the gathering of evidence of criminal activity. It operates as a safeguard on the government's use of informants and as a protection for the innocent, while depriving the guilty only of the opportunity of challenging the informant's credibility free of corroboration. In the absence of electronic devices, the possibility exists that an informant may, without malice, interpret conversations in a way which is unfair to the suspect. Where entrapment is in issue, even slight nuances in describing a conversation may be of crucial importance in drawing the line "between the trap for the unwary innocent and the trap for the unwary criminal." *Sherman* v. *United States,* 356 U.S. 369, 372.

In addition, an electronic device may be important for the protection of the informant both during the transaction and thereafter. It is common knowledge that an informant, particularly one who participates in narcotics transactions, places his life in jeopardy

when he assists law enforcement officers. During the transaction, a transmitting device on the informant's person provides a lifeline to nearby agents in the event his undercover role is discovered or suspected. And when the transaction occurs in a moving vehicle, the transmitting device makes it possible for the agents not only to hear the conversation, but to keep the vehicle under surveillance. Subsequently, when the suspect is charged with the crime, the fact that the case against him does not rest simply on evidence from the informant but also on evidence obtained through electronic devices removes any motivation to threaten or harm the informant in order to escape conviction.

For these reasons, the right of law enforcement officers to use a listening device on an informant or undercover agent should not be limited to those situations where they have "probable cause" to believe that an individual has committed a crime.[7] For example, an agent may have some information indicating that a particular individual is in the business of selling narcotics at a particular location. Even though such information might not amount to probable cause, effective law

[7] The equivalent of a warrant procedure was used in *Osborn* v. *United States*, 385 U.S. 323. There were, however, special circumstances in that case since the suspect was the attorney for an indicted defendant in a case about to be called for trial, and the informant had alleged that the attorney was planning to offer a bribe to a prospective juror. In a case which so closely involved the processes of the court, both with respect to the suspected offenses and the suspected offender, there was particular reason to seek prior judicial authorization in order not to interfere with the pending prosecution.

enforcement requires that the agent should be able to conduct a further investigation to determine whether his information was correct. The best technique for such further inquiry might be to send an undercover agent or an informant to the location with instructions to approach the suspect and attempt to purchase narcotics from him. In such a situation, it would be entirely appropriate to place a listening device on the informant or agent in order to obtain an accurate report of the conversation that occurs and to protect the informant or agent involved. The presence or absence of "probable cause" does not affect the appropriateness of the use of a consensual listening device in such an investigation.

This Court decided in *Lewis* that the government did not need the approval of a magistrate to send an informant into the home of a defendant who used his home for the narcotics trade. There is similarly no reason to require a warrant for the use of a device which merely records or transmits what the informant does, either in the defendant's home, or, with respect to most of the conversations in this case, in the informant's home or automobile.

B. THE UNAVAILABILITY OF THE INFORMANT AS A WITNESS DOES NOT RENDER INADMISSIBLE TESTIMONY CONCERNING THE CONVERSATIONS HEARD OVER THE TRANSMITTER.

The court below distinguished *Lopez* on the ground that the government agent in *Lopez* testified as a witness, while Harvey Jackson, the informant, did not testify here. We do not read *Lopez,* however, as holding only that a recording of a conversation is admissible for

the limited purpose of corroborating such testimony.

As we read *Lopez,* the excludibility, on Fourth Amendment grounds, of the agent's testimony in this case depends on the legality of the agents' conduct at the time when the evidence was secured and not upon the availability of the informant as a witness at trial. Whether or not the evidence is subsequently used at the trial for the limited purpose of corroboration cannot affect the legality of its procurement.[8] If the Fourth Amendment permits a participant in a conversation to carry an electronic device to transmit or record a conversation, the absence of the participant as a witness at the time of trial does not create a *nunc pro tunc* violation of the Fourth Amendment. So long as the government does not supress evidence (see *Brady* v. *Maryland,* 373 U.S. 83), the evidence obtained through participant monitoring should be admissible whether the participant testifies or not.

The government here did not suppress the testimony of the informant, Harvey Jackson, but actively sought to locate him prior to trial.[9] See Statement, *supra,* p. 7. Having failed to locate the informant, there is no sound reason why the government should be pre-

[8] It may be argued here, with respect to the electronic overhearings of conversations in the informant's home, that they corroborated what the agent in the closet saw and heard.

[9] The concurring opinion of Chief Justice Warren in *Lopez* v. *United States*, 373 U.S. 427, 441–446, suggested, in distinguishing *On Lee* v. *United States*, 343 U.S. 747, that the government had improperly used a transmitting device to avoid calling the informant as a witness in that case. However, nothing in this case even suggests that the government was trying to suppress evidence. Here, as we have shown, the informant was not produced because he could not be found.

vented from using other reliable evidence to prove that respondent was a narcotic trafficker. The unavailability of a material witness without fault of the government, in the absence of some actual prejudice to the accused, has never been considered to be a reason for suppressing other legally obtained evidence. Indeed the possibility that the informant may disappear before trial, by foul play or otherwise, is one of the justifications for the use of electronic devices.

The absence of a material witness may justify a continuance of the trial if there is a reasonable likelihood that a delay will secure the presence of the witness. Here, respondent not only failed to seek a continuance, but he did not claim that the informant's testimony was a necessary predicate to the admissibility of the government's other evidence or that the informant was needed by the defense to help establish some ground for excluding the electronically obtained evidence. Indeed, even after Harvey Jackson's wife testified as a defense witness that she had seen her husband the previous night (although admitting, on cross-examination, that she did not know where he could be located), respondent did not request a continuance so that additional efforts could be made to find Jackson.

II

EVEN IF IT IS NECESSARY, UNDER *KATZ* V. *UNITED STATES*, 389 U.S. 347, TO OBTAIN PRIOR JUDICIAL APPROVAL FOR AN INFORMANT TO CARRY A TRANSMITTING DEVICE, THE *KATZ* DECISION SHOULD NOT BE APPLIED RETROACTIVELY TO THIS CASE.

If the Court should reject our submission that the ruling in *Katz* does not require prior judicial ap-

proval for an informant to carry a transmitting device while engaged in narcotic transactions, we would urge that the judgment of the court of appeals should nevertheless be reversed and the convictions reinstated because the *Katz* decision should not be applied retroactively to this case. We think it follows from *Desist* v. *United States,* 394 U.S. 244, that the standards announced in *Katz* do not govern the legality of the participant monitoring which occurred here.

The Court in *Katz* overruled prior decisions that mechanically assisted eavesdropping does not violate the Fourth Amendment unless there is a trespass or an actual penetration of a particular enclosure; it held that the reach of the Amendment "cannot turn upon the presence or absence of a physical intrusion into any given enclosure" (389 U.S. at 353). In *Desist,* government agents situated in a hotel room tapped the petitioner's conversations by means of an electronic recording device which did not physically intrude into the petitioner's adjoining room. This Court concluded that such eavesdropping was permissible under pre-*Katz* decisions and affirmed the conviction secured through the introduction of that evidence. The Court held that *Katz* is to be applied only to cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after the date of the *Katz* decision, December 18, 1967. In rejecting the argument that *Katz* did not depart from the previously existing interpretation of the Constitution, the Court stated in *Desist* (394 U.S. at 247–248): [10]

[10] See also *Kaiser* v. *New York*, 394 U.S. 280.

> * * * But this contention misconstrues our opinion in *Katz*. Our holding there that *Goldman* and *Olmstead* "can no longer be regarded as controlling," 389 U.S., at 353, recognized that those decisions had not been overruled until that day. True, the principles they expressed had been modified. The belief that an oral conversation could not be the object of a "search" or "seizure" had not survived. And in *Silverman* v. *United States*, 365 U.S. 505, we had cautioned that the scope of the Fourth Amendment could not be ascertained by resort to the "ancient niceties of tort or real property law." 365 U.S., at 511. But the assumption persisted that electronic surveillance did not offend the Constitution unless there was an "actual intrusion into a constitutionally protected area." * * *

Under the rule that electronic surveillance without a trespass did not violate the Fourth Amendment, the conduct of the narcotics agents in December 1965 and January 1966 in the instant case was legal. In *On Lee* v. *United States*, 343 U.S. 747, this Court expressly held that there was no trespass when an informant entered On Lee's premises with a microphone hidden on his person. Such monitoring was sustained against a Fourth Amendment challenge by this Court in *Lopez* v. *United States*, 373 U.S. 427. It had been upheld by all the courts of appeals—including the Seventh Circuit—which ruled on the issue in the period before *Katz*.[11] See, *e.g.*, *Harris* v. *United States*,

[11] Indeed, the Seventh Circuit itself has followed *Desist* in a decision subsequent to its decision here. *United States* v. *Teller*, No. 16,047 (C.A. 7), decided June 13, 1969. In *Teller*, the transactions occurred in July 1966 while the transactions here occurred in December 1965 and January 1966. See also *Wallace* v. *United States*, No. 21, 134 (C.A.D.C.), decided May 6, 1969.

367 F. 2d 633 (C.A. 1), certiorari denied, 386 U.S. 915; *United States* v. *Edwards*, 366 F. 2d 853, 868 (C.A. 2); *Johns* v. *United States*, 323 F. 2d 421 (C.A. 5); *United States* v. *Walker*, 320 F. 2d 472 (C.A. 6), certiorari denied, 375 U.S. 934; *United States* v. *Pullings*, 321 F. 2d 287, 295 (C.A. 7); *Jack* v. *United States*, 387 F. 2d 471 (C.A. 9), certiorari denied, 392 U.S. 934.

This Court has already recognized that the principles enunciated in *Desist* apply to cases involving eavesdropping accomplished with the consent of one of the parties. In *Kaufer* v. *United States*, 394 U.S. 458, the Court relied on *Desist* in affirming a conviction which was based, in part, on testimony of federal agents concerning conversations which they overheard by means of an electronic device secreted on the person of an agent who was conversing with the defendant. If the rule of *Katz* does not apply retroactively to a case such as *Kaufer*, there is no reason to apply *Katz* retroactively to the overhearings in this case.[12]

[12] In his brief in opposition to the petition for certiorari, respondent argued that this Court should not retroactively validate a violation of Illinois law. Contrary to this contention, neither the action of the agents nor that of the informant was in violation of the Illinois eavesdropping statute (Article 14–2 of the Illinois Criminal Code of 1961) which proscribes the use of an eavesdropping device to hear a conversation "without the consent of any party thereto." In 1961, the Illinois Supreme Court held that an electronically-assisted overhearing does not violate this statute if consent is obtained from one of the parties to a conversation. *People* v. *Dixon*, 22 Ill. 2d 513, 177 N.E. 2d 224, certiorari denied, 368 U.S. 1003. Thus, when the device was used in this case in December 1965 and January 1966, the overhearings were both legal and admissible into evidence under Illinois law. The fact that

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed and the convictions reinstated.

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subsequently in March 1966, the Illinois Supreme Court in *People* v. *Kurth*, 34 Ill. 2d 387, 216 N.E. 2d 154, overruled so much of the *Dixon* opinion as permitted the introduction into evidence of a monitored conversation against the party whose consent had not been obtained did not make this evidence inadmissible in a federal proceeding. Rule 26, F.R. Crim. P. See also *Elkins* v. *United States*, 364 U.S. 206, 223–224. Indeed, the *Kurth* opinion itself expressly rejected an argument that monitoring with the consent of only one party violated Illinois law. See *United States* v. *Martin*, 372 F. 2d 63 (C.A. 7), certiorari denied, 387 U.S. 919.

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